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FILED
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No. 96-871

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OIL COMPANY,

Petitioner,

v.

BARKAT U. KHAN and KHAN & ASSOCIATES, an Illinois Corporation,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 27, 1996
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The following opinions, orders, and pleadings have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Writ of Certiorari:

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Opinion of the United States Court of Appeals for the Seventh Circuit, entered August 29, 1996 ..	1a
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Order of the United States District Court for the Northern District of Illinois, October 3, 1995 ..	22a
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CHRONOLOGICAL LISTING OF RELEVANT DATES

January 4, 1994	Civil complaint and demand for jury trial filed.
May 19, 1994	Affidavit of Barkat U. Khan
June 30, 1994	Statement of material facts in opposition to plaintiff's motion for summary judgment
March 24, 1995	Motion by defendant, State Oil Company for summary judgment
March 24, 1995	Memorandum by defendant in support of motion for summary judgment
March 24, 1995	Local Rule 12(M) statement of material facts by defendant.
March 29, 1995	Minute order scheduling motions.
June 26, 1995	Motion by plaintiffs for summary judgment on Count II
June 26, 1995	Local rule 12(M) statement in support of plaintiff's motion for summary judgment
June 26, 1995	Memorandum by plaintiffs in support of their motion for summary judgment
June 26, 1995	Memorandum by plaintiffs in opposition to defendant's motion for summary judgment

June 26, 1995	Local rule 12(N) statement by plaintiffs in response to defendant's motion for summary judgment
June 26, 1995	Memorandum by defendant in opposition to plaintiff's motion for summary judgment
June 26, 1995	Motion by defendant to strike the report of Gustavo E. Bamberger
June 26, 1995	Memorandum by defendant in support of defendant's objection to report
June 26, 1995	Rule 12 statement in response to plaintiff's summary judgment motion
June 26, 1995	Response by defendant to plaintiff's rule 12(N) statement
June 26, 1995	Reply by defendant to plaintiff's memorandum in opposition to defendant's motion for summary judgment
June 26, 1995	Affidavit of Diana Longely
July 7, 1995	Memorandum by plaintiff in opposition to defendant's objection and motion to strike
July 7, 1995	Declaration of Barkat U. Khan in support of memorandum in opposition to motion to strike
July 7, 1995	Declaration of Gustavo E. Bamberger

September 12, 1995	Minute order rule in limine that "rule of reason" and not "per se rule" applies in this case
October 3, 1995	Minute order denying plaintiff's motion for reconsideration and granting plaintiff's motion for certification
October 16, 1995	Supplemental response by plaintiff to motion for summary judgment
October 16, 1995	Supplemental memorandum by defendant in support of motion for summary judgment
November 13, 1995	Opinion and order
November 13, 1995	Minute order granting State Oil's motion for summary judgment
November 13, 1995	Entered judgment
December 15, 1995	Notice of appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BARKAT U. KHAN and KHAN & ASSOCIATES, INC., an Illinois Corporation,	)	
Plaintiff,	)	JURY TRIAL DEMANDED
vs.	)	GEN. NO.
STATE OIL COMPANY, a corporation,	)	
Defendants.	)	

COMPLAINT

Plaintiffs Barkat U. Khan and Khan & Associates, Inc., by the Law Office of Gregory J. Ellis and Davis, Mannix & McGrath, their attorneys, and for their complaint against State Oil Company, allege as follows:

ALLEGATIONS COMMON TO ALL COUNTS

1. This is an action for damages and other relief arising out of violations of the Petroleum Marketing Practices Act ("PMPA") (15 U.S.C. § 2801 *et seq.*), the Sherman Antitrust Act (the "Sherman Act") (15 U.S.C. § 1 *et seq.*), and breach of a written lease and supply agreement between the parties.

2. Jurisdiction over the Sherman Act and PMPA claims exists under Section 1331 of the Judicial Code (28 U.S.C. § 1331), Section 4 of the Sherman Act (15 U.S.C. § 4), and Section 4 of the Clayton Act (15 U.S.C. § 15),

and jurisdiction over the breach of contract claim exists under the supplemental jurisdiction of this Court.

3. Plaintiff Khan is an individual residing in DuPage County, Illinois, and is the sole shareholder of Khan & Associates, Inc., an Illinois corporation.

4. During the period from January, 1992 to about February, 1993, Plaintiffs operated a service station/ convenience store at 246 West Lake Street in Addison, Illinois under the "Union 76" trademark.

5. Plaintiffs operated the service station/convenience store under a written lease/supply agreement entered into by the Defendant and Plaintiff Khan on or about January 20, 1992, and entitled "Service Station/Convenience Store Lease/Supply Agreement" (the "Agreement"). A copy of that Agreement is attached as Exhibit A to the Complaint and refers to Plaintiff Khan as "Tenant" and Defendant as "Landlord."

6. Plaintiffs are informed and believe that Defendant is a corporation organized and operating under the laws of Illinois.

7. At all time relevant to this action Defendant has been engaged in the business of leasing service station/convenience stores such as that operated by Plaintiffs, as well as in the sale of petroleum and other products to such service stations for resale to the public under the "Union 76" trademark. Plaintiffs are informed and believe that Defendant is involved in the lease and/or operation of numerous other service stations in the Chicago Metropolitan Area.

8. Plaintiffs are a franchised dealer and Defendant is a franchisor under the provision of the PMPA, 15 U.S.C. § 2801(3).

COUNT 1 - PMPA VIOLATION

1. In a letter dated January 27, 1993, Defendant gave notice to Plaintiff Khan of its intent to terminate the Franchise Agreement effective February 2, 1993, contrary to the terms and provisions of the PMPA, 15 U.S.C. § 2802(a) and (b)(1). Said letter is attached hereto as Exhibit B and by this reference is incorporated herein.

2. Defendant's notice of termination is contrary to the requirements of the Petroleum Marketing Practices Act, including, but not limited to, at least one or more of the following:

(a) Defendant's notice failed to give ninety (90) days notice before the effective date of termination;

(b) It was not reasonable under the circumstances to give less than 90 days notice; and

(c) By taking action to appoint a receiver in state court, Defendant circumvented the provisions of the PMPA.

3. As a direct and proximate result of said wrongful termination, Plaintiffs have lost their Union 76-branded business and Plaintiff Khan's initial investment of more than $100,000.00.

4. Said notice of termination was in willful disregard of the requirements of the PMPA and the rights of Plaintiffs, and Plaintiffs are entitled to exemplary damages pursuant to 15 U.S.C. § 2805(d)(1)(B).

WHEREFORE, Plaintiffs pray for:

(1) Judgment in favor of Plaintiffs and against Defendant for such damages as Plaintiffs have sustained as a result of Defendant's actions in wrongfully terminating

the Franchise Agreement between the parties, in an amount to be determined at trial, as well as exemplary damages of $500,000;

(2) Plaintiff's attorney's fees expert witness fees, costs, and disbursements incurred herein as a result of Defendant's actions pursuant to 15 U.S.C. § 2805(d)(1)(C); and

(3) Such other and further relief as this Court finds just and appropriate.

COUNT II - SHERMAN ACT VIOLATION (RESALE PRICE FIXING)

1. Paragraph 31 of the Agreement is entitled "Petroleum Products Supply Agreement" (the "PPSA") and purports "to assist in maintaining the competitive position" of Plaintiffs and Defendant by allowing Defendant to fix and control the prices at which Plaintiffs resold gasoline to the public. Specifically, paragraph 31 of the Agreement provides that:

> The Tenants margin will be $0.0325 (three and ¼ cents) per gallon. In the event the Tenant elects to sell at retail at a price in excess of the recommended retail pump prices established by the Landlord, the Tenant shall pay the Landlord a sum equal to the difference between the retail pump price at which the gasoline in question has been sold, and the recommended retail pump price established by the Landlord multiplied by the number of gallons sold. In the event the Tenant elects to sell at a retail pump price below the recommended retail pump price established by the Landlord, the Tenant shall not be entitled to a reduction in price to cover the difference.

(*See* Exhibit A at ¶31.) The stated $0.325 margin applies to cash sales only. When Plaintiffs' customers chose to purchase gasoline on credit, the margin fell to approximately $0.02 due to fees, discounts, and/or other charges associated with the use of credit cards. (See Exhibit A at ¶32).

2. The PPSA, by its express terms, interfered with and restricted the ability of Plaintiffs to freely and openly set the prices of the gasoline which they resold to the public. Plaintiffs were unable to charge either higher or lower prices than the recommended retail pump price, which pricing would have enabled them to obtain a profit-maximizing price mix for their gasoline products.

3. The PPSA therefore constitutes a restraint of trade which is unreasonable and also constitutes a *per se* violation of Section 1 of the Sherman Act. 15 U.S.C. § 1.

4. As a direct and proximate result of said violation, Plaintiffs have sustained substantial damages in an amount believed to be in excess of $1,000,000 (before trebling), but to be specifically determined herein, including lost sales and profits on the sale of both petroleum and non-petroleum products, and the ultimate loss of Plaintiffs' service station business. Plaintiffs have thereby been injured in their business and property by reason of said antitrust violation.

5. Plaintiffs are entitled to treble damages and costs of suit, including attorney's fees, in an amount to be determined herein by reason of said Sherman Act violation. Plaintiffs are also entitled to interest on the damages as stated herein. 15 U.S.C. § 15.

WHEREFORE, Plaintiffs pray for entry of judgment against Defendant State Oil Company in an amount to

be determined herein, the trebling of said damages, together with attorney's fees, costs, interest, and such other relief as this Court deems proper.

COUNT III - SHERMAN ACT VIOLATION (TYING)

1. Plaintiffs reallege and incorporate by reference the allegations contained in Paragraph 1 of Count II of their Complaint.

2. The PPSA contained in the lease/supply Agreement of January, 1992 further provides in relevant part that:

> Tenant agrees to purchase all petroleum products from Landlord. . . . Tenant is to purchase such items from Landlord at competitive market prices.

(*See* Exhibit A at paragraph no. 31.)

3. By requiring Plaintiffs "to purchase all petroleum products from Landlord", Defendant tied the purchase and sale of petroleum products to the lease of the premises at 246 West Lake Street, Addison, Illinois, and thereby unreasonably restrained a non insubstantial amount of trade and commerce in the purchase and sale of said petroleum products, in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1.

4. As a direct and proximate result of said violation, Plaintiffs were precluded from freely purchasing petroleum products from other suppliers at fair and competitive prices.

5. Plaintiffs have sustained substantial damages by reason of said unlawful tie-in an amount to be determined herein and which include, but are not limited to, the following: 1) the payment of non-competitive prices for petroleum products; 2) the loss of sales and profits on

the sale of both petroleum and non-petroleum products; and 3) the ultimate loss of Plaintiffs' service station business. Plaintiffs have thereby been injured in their business and property by reason of said antitrust violation.

6. Plaintiffs are entitled to treble damages and costs of suit, including attorney's fees, in an amount to be determined herein by reason of said Sherman Act violation. Plaintiffs are also entitled to interest on the damages as stated herein. 15 U.S.C. § 15.

WHEREFORE, Plaintiffs pray for entry of judgment against Defendant State Oil Company in an amount to be determined herein, the trebling of said damages, together with attorney's fees, costs, interest, and such other relief as this Court deems proper.

COUNT IV - BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

1. Plaintiffs reallege and incorporate by reference the allegations contained in Paragraph 1 of the Count II of their Complaint.

2. Because of Defendant's ability to change posted gasoline prices at will, there is implied in the PPSA set out in paragraph 31 of the Agreement a covenant that Defendant will exercise its ability to change posted prices in good faith and will deal fairly with Plaintiffs in so doing.

3. During the time Plaintiffs operated said service station, Defendant, without regard for the ability of Plaintiffs to sell gasoline and other products on a profitable basis, set posted prices at artificially high and/or

low levels, thereby interfering with Plaintiffs' ability to compete in the gasoline market.

4. Moreover, the prices which Plaintiffs paid to Defendant for petroleum products and, in particular, for gasoline pursuant to paragraph no. 31 of Exhibit A were not competitive market prices as required by the PPSA.

5. Defendant's actions violated the covenant of good faith and fair dealing implied in the PPSA.

6. As a direct and proximate result of Defendant's action in setting the retail price of gasoline sale by Plaintiffs at the service station, and in setting the wholesale price of the petroleum products, Plaintiffs have suffered a substantial loss of sales and profits on the sale of gasoline and other petroleum products, as well as on the sale of food and other products sold at the service station, and the ultimate loss of Plaintiffs' service station business.

WHEREFORE, Plaintiffs pray for entry of judgment against Defendant State Oil Company in an amount to be determined herein, together with attorney's fees, costs, and such other relief s this Court deems proper.

BARKAT U. KHAN and KHAN & ASSOCIATES, INC., Plaintiffs

By:_____
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JURY TRIAL DEMANDED

Plaintiffs, Barkat U. Khan & Associates, Inc., respectfully request a trial by jury as appropriate on their claims for relief.

Dated: January 4, 1994.

SERVICE STATION/CONVENIENCE STORE LEASE/ SUPPLY AGREEMENT

This lease, made and entered into this 20th day of January, 1992, by and between State Oil Company with its principal offices at 400 S. Curran Road, Grayslake, Illinois 60030, hereinafter call Landlord and U. Khan (Bob) Barkat 8124 S. Garfield Avenue, Burr Ridge, IL 60521 (708) 920-9786, hereinafter called Tenant,

WITNESSETH:

The Landlord, for and in consideration of the covenants and agreements hereinafter set forth to be kept and performed by the Tenant, demises and leases to the Tenant, and the Tenant does hereby take, accept, and rent from the Landlord the premises hereinafter described. For the period, at the rental, and upon the terms and conditions hereinafter set forth:

Demised Premises

1. The Landlord leases to the Tenant, and the Tenant rents from the Landlord, the premises known as ADDISON 76 246 W. Lake Street, Addison, IL 60101 with the legal description as follows:

SEE ATTACHED SCHEDULE A

Term of Lease

2. The term of this lease shall commence on 1/20/92 as hereinafter defined, and shall continue for a period of three years expiring without notice on 1/19/95. Landlord and tenant shall have the option to renew this lease/ supply agreement at the end of the term stated herein.

Occupancy Date

3. The obligation to pay rent shall begin 1/20/92. The Tenant shall be entitled, effective 1/20/92 to begin preparing the property for its occupancy hereunder and shall be entitled to whatever possession is necessary for that purpose. As of 1/20/92 the Tenant shall assume all responsibilities for protection of the property and the equipment on the property.

Use of Premises

4. Tenant shall occupy and use the leased premises exclusively for the retail sale of gasoline and allied petroleum products supplied by the Landlord and for the operation of a convenience grocery store and the retail sale of all nature of merchandise generally associated with such operations, The Tenant shall continuously and uninterruptedly during the term of this lease conduct its customary business activity therein during all normal business days and during the Tenant's customary hours, not less than 24 hours daily and 7 days a week unless prevented from doing so by strike, fire, casualty or other causes beyond the Tenant's control and except during reasonable periods for repairing, cleaning and decorating the leased premises. If the Tenant shall abandon or close the premises for a period of 24 hours or more during any calendar year, Landlord shall have the right to treat this lease as terminate and to retake possession of the premises.

Security Deposit

5. Upon the unsealing hereof the Tenant shall deposit with the Landlord the first month's rent and a security deposit for an amount equal to the last month's rent provided in the schedule above. The security deposit shall be

held by the Landlord to assure faithful performance of the rent payments contained herein and the return of the premises in an acceptable manner to Landlord.

Title and Possession

6. Landlord covenants and warrants that it has full right and authority to enter into this lease for the full term hereof. Landlord further covenants that Tenant, upon paying the fixed annual rent provided for herein, and upon performing the covenants and agreements of this lease to be performed by said Tenants will have, hold and enjoy quiet possession of the leased premises.

Origination and Going Concern Fee

7(a). The tenant shall pay an Origination Fee of Seventy-five Thousand Dollars ($75,000.00). The tenants shall pay a refundable origination fee of Twenty-five Thousand Dollars ($25,000.00) upon the execution of this agreement and the balance of Fifty Thousand Dollars ($50,000.00) upon possession of the demised premises.

7(b). The parties recognize and agree that the demised premises is a going concern and as such is a value to the tenant, in recognition thereof the tenant agrees to pay a going concern fee of twenty-five Thousand Dollars ($25,000.00) upon possession of the demised premise on 1/20/92.

Rent

8. Tenant hereby agrees to pay rent to the Landlord at 400 S. Curran Road, Grayslake, Illinois 60030 or at such place directed in writing from time to time by Landlord.

Tenant shall pay to Landlord by the first day of each month in advance, the fixed rental as set forth

below. Failure of Tenant to meet rental payment terms will result in a penalty of $5.00 per day for the first 15 delinquent days and $10.00 per day thereafter until all monies are received by the Landlord.

	Rent per Month
1/20/92-1/31/92 (prorated-11 days)	$ 2,661.34
2/1/92-1/19/93	$ 7,500.00
1/20/93-1/19/94	$ 8,000.00
1/20/94-1/19/95	$ 8,500.00

Note: Any partial months will be prorated.

Holding Over

9. Tenant will, at the termination of this lease by lapse of time or otherwise, yield up immediate possession to Landlord, and failing so to do, will pay as liquidate damages for the whole time such possession is withheld, the sum of THREE HUNDRED Dollars ($300.00) per day; but the provisions of this clause shall not be held as a waiver by Landlord of any right of re-entry as hereinafter set forth; nor shall the receipt of said rent or any part thereof, or any other act in apparent affirmance of tenancy, operate as a waiver of the right to forfeit this lease and the term hereby granted for the period still unexpired for a breach of the covenants herein.

Confession of Judgment

10. Tenant does hereby irrevocably constitute any attorney of any Court of Record in any State or of the United States, attorney for him and in his name, from time to time, to waive the issuance of process and service thereof, to waive trial by jury, to confess judgment in favor of Landlord, his heirs, executors, administrators, successor or assigns, and against Tenant, for the amount of rent which may be in default by virtue of the terms

hereof, with the costs of such proceedings, and a reasonable sum for plaintiff's attorney's fees in or about the entry of said judgment, and for said purposes to file in said cause his cognovit thereof, and to make an agreement in said cognovit, or elsewhere, waiving and releasing all errors which may intervene in any such proceeding, waiving and releasing all errors which may intervene in any such proceeding, and waiving and releasing all right of appeal and right to writ of error, and consenting to immediate execution upon such judgment. If there be more than one Tenant this warrant of attorney is given jointly and severally, and shall authorize the entry of appearance of, waiver of issuance of process and trial by jury by and confession of judgment against any one or more of such Tenants, and shall authorize the performance of every other act in the name of and on behalf of any one or more of such Tenants, and Tenant hereby confirms all that said attorney may lawfully do by the virtue. . .

Payment of Fees

11. Each party will pay and discharge all reasonable costs, attorney's fees and expenses that may be incurred by the other party, in enforcing the covenants and agreements of this lease, and this lease and all covenants and agreements herein contained shall be binding upon, apply, and inure to their respective heirs, executors, successors, administrators, and assigns of all parties to this lease.

Utilities; Liens

12. Tenant shall pay promptly all charges for municipal or public utility services to, in, or upon the demised premises, and shall pay promptly for garbage and waste

removal, if any, and shall pay promptly all bills for material furnished or labor performed by Tenant, or at Tenant's instance and request, in connection with any repairs, alterations, improvement, decorating, or installation of fixtures and equipment on the demised premises, and keep said demised premises free from all claims for liens for work, labor or materials, on account thereof.

Taxes

13. The Landlord shall be responsible for and pay all real estate taxes levied upon the demised premises. The Landlord shall be responsible for all personal property taxes upon the equipment installed by it. In the event of any litigation between the parties hereto, the losing party shall, in addition to any judgment entered, pay all costs and attorney's fees incurred by the other party.

Landscaping

14. Landlord shall provide and pay for the initial landscaping of the premises herein demised and the Tenant shall be responsible to pay for all maintenance upkeep of the landscaping.

Liability and Liability Insurance

15. Tenant shall save and hold Landlord free and harmless from all claims, damages, suits, or causes of action including all legal costs of defense and any and all costs resulting from injuries or damage to persons or property and arising or claims arising thereon or out of the use, occupancy, or condition of the leased premises, except as are covered by Landlord's fire and extended insurance, and Tenant shall carry, maintain and deposit proof annually with Landlord of public liability insurance with reputable companies insuring Tenant and naming

Landlord as certificate holder/additional insured, as their interest may appear, against liability in the minimum amount of Five Hundred Thousand Dollars ($500,000) to any one person and One Million Dollars ($1,000,000) for any one accident arising in or about the leased premises. The insurance limits and coverages may vary from time to time. Landlord agrees to give 30 days written notice of any and all changes in the insurance requirements to Tenant. Tenant agrees to make any and all changes in the insurance requirements, at Tenant's sole expenses upon receipt of the notice of change from Landlord.

Tenant agrees to all provisions of the Lease for the protection of the premises, all protection from liability shall inure to the benefit of Bill Anest and Peter Anest d/b/a S & S Petroleum Products and State Oil Company. Tenant shall supply Landlord with a Certificate of Insurance within 30 days of the signing of this agreement and annually thereafter.

Liquor License and Insurance

16. Tenant agrees, that in the event Landlord is able to assign or obtain the assignment of a liquor license, Tenant will reimburse Landlord for any and all expenses, fees, etc., incurred by Landlord to obtain said liquor license. It is further understood and agreed between the parties hereto that in the event a liquor license is issued to Tenant for the operation of a convenience store at the premises demised herein that license shall be utilized only in connection with said premises and that in the event of a termination of this lease for any reason Tenant agrees that he will assign all interest in said license to Landlord, and will release any right or interest which Tenant may have therein, and will direct

the licensing agent to reissue said license in the names of Landlord or their nominees. Tenant further agrees, that to the extent possible, this paragraph shall constitute such an assignment and direction effective upon the termination of this lease, Tenant understands that any attempt to transfer said license to a different location will cause irreparable damage to Landlord, which damage is not capable of accurate determination; and they do hereby consent, in the event of any attempt to transfer said license without the approval of Landlord, to the immediate issuance of a restraining order by any court of record, without notice to Tenant, forbidding the transfer of said license. That Tenant will provide Landlord with liquor liability insurance paid six months in advance.

Fire and Extended Coverage

17. Landlord shall procure and maintain at its own expense during the term of this lease, fire, windstorm and extended coverage insurance on the leased premises.

SALE OF PREMISES

18. In the event of any sale of the premises by Landlord (or S & S Petroleum Products) during the term of this lease, Tenant shall have a right of first refusal to purchase the premises at the same terms and conditions as those at which Landlord proposes to sell. This right shall be deemed to have been waived, unless Tenant shall notify Landlord or his election to proceed with such purchase within 30 days of the date of receipt by Tenant of a copy of Landlord's proposed sale agreement. This right shall not accrue to an assignee of this lease.

Condemnation

19. If all or part of the leased premises are taken or condemned for public purposes by public authorities

(whether by judicial action or settlement arising out of negotiation), the award shall be made to Landlord. In the event such of the parking area or leased premises are taken by condemnation as renders it impracticable or impossible for Tenant to carry on its business, or in any event if more than thirty percent (30%) of the square footage of the parking lot or leased premises is taken, Tenant may cancel and terminate this lease upon thirty (30) days written notice to Landlord. Such notice may only be given before the condemnation proceedings is tried, the settlement is reduced to writing, or Tenant is required to vacate the premises, whichever occurs first, and the term of this lease shall end as of the date of condemnation award is paid to Landlord and accepted by it in full and final settlement of all claims, or Tenant is required to vacate whichever occurs first. In no event shall Tenant be liable for rent after having vacated the premises according to law. If this lease is not so terminated, rent shall abate in proportion to the amount of floor area condemned, as of the date the floor area shall become unavailable to Tenant, and Landlord shall at its expenses restore the remaining area in tenantable condition.

Cancellation of Lease

20. Tenant shall have the right to cancel this lease by giving Landlord Ninety (90) days written notice by Certified Mail. In the event Landlord shall, at any time during the term of this lease, elect to sell the premises leased hereunder, the Landlord shall be entitled to terminate the lease upon notice to Tenant accompanied by an offer to sell to the Tenant, the premises being sold at the same terms and conditions as those on which the Landlord proposes to sell. Landlord may make any and

all modifications in all agreements that are set forth or may terminate this lease by giving Tenant thirty (30) days written notice by Certified Mail. If the Landlord shall enter into a lease agreement with a different supplier, the Tenant agrees to enter into a new lease and supply agreement upon the terms provided by that supplier.

Purchase of Inventory and Equipment Upon Termination

21. In the event this Lease is terminate by the Tenant, then the Landlord may purchase from the Tenant all store merchandise and gasoline inventory at the Tenant's actual cost. The amount of purchase shall be due and payable on the date that the Tenant vacates the demised premises subject to the uniform commercial code requirement and any outstanding indebtedness to Landlord.

Any and all equipment installed or replace by Tenant shall become a permanent fixture and shall remain in the building and become the property of the Landlord at the expiration of this Lease.

Subordination to Underlying Lease

22. This Lease is subordinate to any underlying lease now, or hereinafter, in effect between Landlord and its lessor. Landlord is under no obligation to extend or renew such underlying lease. In the event of termination or cancellation thereof, this Lease shall terminate automatically, without liability on Landlord's part.

Assignment

23. Tenant shall not assign this lease or gasoline supply agreement without prior written consent of Landlord, but such consent shall not be unreasonably with-

held. Landlord's consent to one assignment shall not be deemed a consent of any other or further assignment.

Covenant to Bind Successors

24. It is agreed that the provisions, covenants and conditions of this lease shall bind and inure to the benefit of the legal representative, successors and assigns of the respective parties hereto.

General Provisions

25. Nothing contained in this lease shall be deemed or construed by the parties hereto or by a third party to cheat the relationship of principal and agent or of partnership or of joint venture or of any association whatsoever between Landlord and Tenant, it being expressly understood and agreed that neither the method of computation or rent nor any other provisions contained in this lease nor any act or acts of the parties hereto, shall be deemed to create any relationship of Landlord and Tenant.

Improvements

26. Tenant shall not make any improvements or modifications to the premises without prior written consent by the Landlord. Any and all improvements made by the Tenant will become the property of the Landlord.

Landlord reserves the right to make any additional improvements to the premises.

Upon completion of any improvements by the Landlord, Landlord will have the right to adjust the monthly rental for any such improvements.

Remodeling of Premises

27. In the event that Landlord elects to remodel said premises for whatever purpose, during the term of this

lease, Landlord shall have the right to cancel this lease by giving Tenant Thirty (30) days written notice by Certified Mail. Tenant shall have the right of first refusal to enter into any new lease agreement at the terms and conditions as set down by Landlord. This right shall be deemed to have been waived, unless Tenant shall notify Landlord or his election to proceed with such Lease within 20 days of the date of receipt by Tenant of a copy of Landlord's proposed lease agreement. This right shall not accrue to an assignee of this lease.

Public Telephones

28. All public telephones are provided for and controlled by Landlord and Tenant has no financial claim.

Equipment Repairs and Maintenance

29. The Landlord shall provide all gasoline dispensing equipment, readout consoles in the store and underground storage tanks. The Landlord shall be responsible for the maintenance of all gasoline dispensing and electronic read-out equipment except damages. Landlord will repair, except for damages cause by negligence or deliberate acts by Tenant or any other person: The roof, driveway, canopy, underground storage tanks and piping, islands, weight bearing structural damage, and all exterior lighting, excluding cleaning and lambing.

The Tenant shall be responsible for the maintenance and repair of all other equipment and improvements. Tenant shall be entitled to all warranties available to Landlord upon the installation of the original equipment (see equipment list attached). The Tenant shall also be responsible for the replacement and condition of all hoses and nozzles.

Identification of Business

30. The Landlord shall be responsible for supplying and maintaining all signs and advertising relating to the gasoline brand being dispensed from the demised premises. In the event, the Tenant desires to use another name to identify the convenience grocery operation upon the demised premises, the name will be mutually agreed upon by both the Landlord and Tenant. The Landlord reserves the right to change the brands of gasoline at anytime.

Petroleum Products Supply Agreement

31. The Landlord shall furnish to the Tenant a supply of gasoline reasonable for its sales need, to the degree possible and the Tenant shall purchase its gasoline supply exclusively from the Landlord. The Landlord shall make reasonable efforts to provide an adequate supply. If the Landlord is unable to supply the Tenant's reasonable needs of gasoline, and if the Tenant shall be able to acquire a supply of gasoline from any other source, Tenant agrees to enable the Landlord to purchase that gasoline for resale to Tenant at the cost and terms available to Tenant.

In order to assist in maintaining the competitive position of both Landlord and Tenant, the Landlord will from time to time establish a recommended retail pump price for each type of gasoline sold at the location. The Landlord shall charge the Tenant for each transport of gasoline at the recommended retail pump price less margin and sales tax. The Tenant's margin will be $0.0325 (three and ¼ cents) per gallon. In the event the Tenant elects to sell at retail at a price in excess of the recommended retail pump price established by the Landlord,

the Tenant shall pay the Landlord a sum equal to the difference between the retail pump price at which the gasoline in questions has been sold, and the recommended retail pump price established by the Landlord, the Tenant shall not be entitled to a reduction in price to cover the difference. State sales tax shall be the sole responsibility of the Tenant.

The Tenant shall pay, per gasoline supply agreement, for any gasoline located in the underground storage tanks on the date of the commencement of the term of this lease. Payment terms for all future transport deliveries of gasoline at the demised premises will be paid at the time of deliver.

Tenant agrees to purchase all petroleum products from Landlord; Tenant is responsible for the purchase and payment of all signs and advertisement material. Pump hoses and nozzles will be the responsibility of Tenant. Tenant is to purchase such items from Landlord at competitive market prices.

(A) Grade. Gasolines shall be Landlord's regular commercial grades generally offered to Landlord's customers for similar use and sale at time and geographical region (which is Lake, Cook, Kane, McHenry, Dupage, Kendall, Will & all other Counties in Illinois) of delivery. Landlord reserves the right to change or discontinue, from time to time, any such brands or grades.

(B) Delivery. Deliveries of said gasolines shall be made by Landlord on Tenant's order in single deliveries of not less than 7,500 gallons. Landlord shall be required to make deliveries within 48 hours following receipt of Tenant's order but need not make such deliveries outside of normal business hours or on Sunday or holidays.

(C) Liabilities. The obligation of the parties to deliver and receive gasolines hereunder shall be suspended and excused (a) if Landlord is prevented from or delayed in producing, manufacturing, transporting or delivering its normal manner any gasoline hereunder or the materials from which such gasoline is manufactured because of acts of God, earthquake, fire, flood or the elements, malicious mischief, riots, strikes, lockouts, boycotts, picketing, labor disputes or disturbance, compliance with any directive, order or regulation of any governmental authority or representative thereof acting under claim or color of authority; or (b) loss or shortage of any gasoline due to reasons beyond Landlord's reasonable control; or (c) loss or shortage of any part of Landlord's own or customary transportation or delivery facilities due to reasons beyond Landlord's reasonable control; or (d) for any reason beyond Landlord's or Tenant's reasonable control. Whenever such causes, in Landlord's judgement, require restriction of deliveries, Landlord reserves the right, in its discretion, to restrict deliveries to Tenant, whether or not delivering to others.

(D) Payments. All sums paid to Landlord shall be paid in lawful money of the United States of America without discount at time of delivery or upon such other terms as Landlord may from time to time require. All sums paid shall be applied first to the payments of any outstanding obligation for product purchases, credit card charge backs, and/or repairs including all bills due to Landlord, with the balance being applied to payments on the Store Lease executed contemporaneously herewith.

(E) Resale Provision. Tenant agrees to resell all gasolines herein provided only under Landlord's brands or authorized brands, and to maintain Landlord's brands

or authorized brands, trade-marks and names on the pumps and other facilities through which said gasolines are dispensed. Tenant agrees not to mix, substitute or adulterate said gasolines with any other gasolines or materials. The primary business activity of Landlord is the sale and distribution of petroleum products and is the understanding of the Landlord and Tenant that the Tenant will continue during the term of this agreement to purchase all petroleum products at this location from the Landlord. In the event the Tenant mixes, substitutes, or adulterates said petroleum products, or at Landlord's option, this lease may be terminated upon 5 (five) days written notice to tenant. The Tenant understands this paragraph in its entirety and upon signing of the lease is in complete agreement with all of the above.

(F) Notice. Any payments, requests or notice required or permitted to be given hereunder to Tenant shall be deemed properly given and served when deposited, postage prepaid, Registered or Certified, in the United States mail address to Tenant at his place of business specified above or, in lieu of such demands, request or notices may be personally served upon Tenant. Any notices hereunder required or permitted to be given to Landlord shall be deemed properly given and served when deposited, postage prepaid, Registered or Certified, in the United States mail addressed to Landlord at 400 S. Curran Road, Grayslake, Illinois 60030.

(G) Modification. This lease may be modified of superseded by any and all governmental laws and regulations enacted subsequent hereto pertaining to Energy Allocation and Conservation; however, hardships and forfeitures shall not be enforced between parties as a result.

(H) Tenant's Assignment. This lease and supply agreement shall not be assigned by Tenant or by operation of Law without Landlord's prior written consent, which shall not be unreasonably withheld, but otherwise shall be binding upon and shall inure to the benefit of the parties, and heirs, their representatives, successors and assigns.

Credit Cards

32. The Tenant shall have the option of accepting credit cards for retail gasoline sales. If a nationally-branded gasoline product is being advertised and sold from the demised premises, and if the major oil company whose brand is being used required that its credit cards be accepted, then the Tenant shall accept such credit cards and shall comply with all credit card regulations of supplying company. All fees, discounts or charges including charge-backs associated with the use of the credit card will be at the sole expenses of the Tenant,.

Meter Readings and Inventory Control

33. Landlord reserves the right, at their option, to have a representative audit the meter readings at the beginning of any given month to verify purchases against sales. Inventory control is required because of the pollution insurance on all underground storage tanks. Tenant agrees to take stick readings and pump readings on every day of each month and mail the inventory control forms and tank data sheets to State Oil Company, 400 S. Curran Road, Grayslake, Illinois 60030, on or before the 5th day of the following month.

Sales Tax Affidavit

34. Tenant agrees to provide Landlord with a signed sales tax affidavit.

Paragraph Headings

35. The paragraph titles herein are for convenience only and do not define, limit, or construe the contents of such paragraphs.

Representations

36. U. Khan (Bob) Barkat has made his own investigation concerning the demised premises and the business conducted thereon and is not entering into this transaction because of any statement, representation or warranty by State Oil Company or any one on their behalf except as stated below:

The tenant understands that although he is taking over a going business, there are certain risks involved in running any business, and to a great degree the success of the business will depend on the effort and judgement of the tenant. As with any business there is a definite risk of loss. The tenant hereby assures State Oil Company that he is financially able to incur any risk of loss which exists particularly if geographical or economic conditions change or if the operation of the business does not meet the necessary standards.

RECEIPT OF NOTICE

37. I (we) have received a copy of the SUMMARY OF THE PETROLEUM MARKETING PRACTICES ACT, #3128-01-Federal Register-Vol. 43, No. 169, which is made part of my lease with STATE OIL COMPANY.

IN WITNESS WHEREOF, the parties hereunto have caused this lease to be executed, in Grayslake, Illinois, this 6th day of January, 19 92.

LANDLORD: STATE OIL COMPANY

By:_____
Peter Anest, President

OR

/S/_____
Bill Anest, Secretary/Treasurer

TENANT:

By: /S/_____
U. Khan (Bob) Barkat

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BARKAT U. KHAN and KHAN & ASSOCIATES, INC., an Illinois Corporation,	)	
Plaintiff,	)	JURY TRIAL DEMANDED
vs.	)	Gen. No.
STATE OIL COMPANY, a corporation,	)	
Defendants.	)	

DECLARATION OF
GUSTAVO E. BAMBERGER, Ph.D.,
IN SUPPORT OF MEMORANDUM IN
OPPOSITION TO OBJECTION
AND MOTION TO STRIKE

Gustavo E. Bamberger, Ph.D., on oath, deposes and states that if called to testify in this matter he could competently testify to the following based on his personal knowledge:

1. He is Vice President and Senior Economist at Lexecon Inc., 332 South Michigan Avenue, Suite 1300, Chicago, Illinois 60604.

2. A copy of Dr. Bamberger's expert witness report prepared in the above-captioned case (the Report") is attached hereto as Exhibit A.

3. Copies of the document that Dr. Bamberger utilized in preparing his Report are attached hereto as Group Exhibit B.

4. Documents No. 1 through 6 of Group Exhibit B were generated by Dr. Bamberger at his office based on various data gleaned from Documents No. 7 through 12.

5. For example, Document No. 3, which reflects the Receiver's Average Margin Per Gallon during May-September, 1993, was generated by calculating the overall gasoline margin for that same period (by subtracting the cost of goods sold from the sales figures contained in Document No. 10), and then by dividing that number by the gallonage sales for that same period (contained in Document No. 7). The result is approximately .038, a margin per gallon higher than the margin dictated by the parties agreement, which was .0325.

6. Document No. 7 is a true and correct copy of a letter received by Dr. Bamberger from Barkat U. Khan dated June 8, 1994.

7. Document No. 8 is a true and correct copy of Illinois Department of Revenue correspondence and data received by Dr. Bamberger from Denise M. Kaplan, Esq., counsel for plaintiffs.

8. Document No. 9 is a true and correct copy of a letter received by Dr. Bamberger from Barkat U. Khan dated February 14, 1995.

9. Document No. 10 is a true and correct copy of Addison 76 Receivership Income Statements for February, 1993 through September, 1993 received by Dr. Bamberger from Barkat U. Khan.

10. Document No. 11 is a true and correct copy of Khan & Associates, Inc.'s U.S. Corporation Income Tax Return for 1992 received by Dr. Bamberger from Barkat U. Khan.

11. Document No. 12 is a true and correct copy of the relevant Consumer Price Index from the Economic Report of the President of the United States, 1995.

12. In addition to the review of the above-referenced document, Dr. Bamberger also met with Barkat U. Khan, Champ W. Davis, Esq., the late David C. Bogan, Esq., and Denise M. Kaplan, Esq. He also spoke with the Receiver's Manager, Timothy McNally.

13. Based on the above, Dr. Bamberger swears that the Report contains his truthful and accurate opinion of plaintiffs' damages in this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 7, 1995.

Gustavo E. Bamberger,
Ph.D.

REPORT OF GUSTAVO E. BAMBERGER

1. My name is Gustavo E. Bamberger. I am a Vice President and Senior Economist at Lexecon Inc., an economics consulting firm that specializes in the application of economic analysis to legal and regulatory issues. I received a B.A. degree from Southwestern at Memphis and M.B.A. and Ph.D. degrees from the University of Chicago. I have served as an expert witness in U.S. Federal Courts, before the Illinois Commerce Commission, and in an arbitration proceedings, and I have submitted testimony to the U.S. Senate. My Curriculum Vita, including a listing of my previous testimony, is attached as Exhibit A. Lexecon bills for my time at a rate of $290 per hour, plus expenses.

2. I have been asked by counsel for Barkat U. Khan and Khan & Associates, Inc. ("Khan") to estimate the gross dollar margin (i.e., revenue less cost of goods sold) that Khan could have earned on gasoline and ancillary (e.g., groceries, cigarettes, pop) sales if he had been allowed to set retail prices of gasoline without the constraints imposed by the State Oil Company ("State Oil"). Khan's service station/convenience store was located in DuPage county and was operated under a three year lease/supply agreement with State Oil which was entered into on approximately January 20, 1992. Khan operated the station until approximately February 8, 1993, at which time its operation was taken over by a Receiver, who remained in control of the station until approximately September 7, 1993.

3. In my opinion, Khan could have earned gross dollar margins of $212,996 in 1992, $211,092 in 1993, and

$216,580 in 1994.[1] I understand that Khan's actual gross dollar margin on gasoline and ancillary sales in 1992 was $183,621. Thus, the constraints imposed on Khan by State Oil reduced Khan's profits by $29,375 in 1992 (i.e. $212,996 less $183,621).

4. Under the terms of his contract with State Oil, Khan's gross dollar margin could be at most $0.0325 per gallon and could be zero or a loss if Khan lowered prices below State Oil's posted retail prices. Any additional per gallon margin received from sales of gasoline sold at prices above the posted price was to be paid to State Oil under the terms of the lease. It is Khan's position that he could have increased his business's total gross margin by increasing the per gallon margins he received on premium grades of gasoline (i.e., by charging more than the State Oil posted price and being allowed to keep the entire per gallon margin) and reducing per gallon margins on regular gasoline.

5. I understand that, beginning about May 1, 1993, the Receiver stopped adhering to State Oil's posted retail prices and increased per gallon margins on premium and mid-grade gasoline and reduced the per gallon margin on regular gasoline. I also understand that the Receiver operated the station in substantially the same way as Khan (e.g., the station's hours of operation did not change) and that competitive conditions in the immediate vicinity did not change substantially (e.g., no new gasoline station opened within a few blocks of Khan's

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[1] Because information on partial months is not available, I approximate the term of Khan's contract (January 20, 1992-January 19, 1995) by the three-year period 1992-1994.

former location; no gasoline station closed within a few blocks of Khan's former location; no substantial road work was done in front of a competitor's station).

6. I have analyzed the Receiver's experience between May and September, 1993. Based on the Receiver's experience over this period, it is my opinion that Khan could have increased his gross dollar margin if his pricing policies had not been constrained by State Oil. The difference in Khan's sales during the period May to September 1992 and the Receiver's sales in the corresponding five months in 1993 reflects the effect of the change in pricing policy that the Receiver put in place, which Khan was prevented from implementing. (The difference in 1992 and 1993 sales also may reflect, in part, changes in general economic conditions. By calculating the effect of changes in general economic conditions, I am able to isolate the effect of the change in pricing policy.)

7. During the period May-September 1993, the Receiver sold about 20.8 percent more gallons of gasoline than Khan over the corresponding period in 1992. Because the change in pricing policy increased the margin on premium gasoline and lowered the margin on regular gasoline, one would expect that the change in pricing policy would result in higher sales of regular gasoline and lower sales of premium gasoline. Therefore, regular gasoline should account for a higher percentage of total gasoline sales in 1993 than in 1992. This expectation is confirmed by comparing sales data from May-September 1992 and May-September 1993. See Table 1.

8. I estimate the effect of general economic conditions on gasoline sales at the former Khan location by assuming that absent the change in pricing policy, gallon sales at Khan's former location would have changed by the same percentage amount as total gasoline gallon sales in DuPage County. Based on records provided by the Illinois Department of Revenue, I find that total gasoline gallon sales in DuPage county were about 11.6 percent higher during May-September 1993 than during May-September 1992. The pricing flexibility utilized by the Receiver therefore resulted in increased sales of approximately 9.2 percent (i.e. a 20.8 percent increase less the 11.6 percent increase attributable to changes in general economic conditions). Thus, based on the Receiver's experience, I estimate that Khan's sales in 1992 would have been abut 9.2 percent higher if his contract with State Oil did not constrain his ability to set retail prices. Based on the Receiver's experience, I also find Khan would have been able to earn higher per gallon margins absent the restrictions of the State Oil contract—during the period May - September 1993, the receiver earned average gross margins of $0.0382 per gallon, or 17.5 percent more than State Oil-imposed maximum of $0.0325 per gallon.

9. Khan earned a gross margin of $65,173 on gasoline sales in 1992 (i.e. 2,005,317 gallons at $0.0325 per gallon). Based on the Receiver's experience, it is my opinion that Khan could have earned a gross margin of $83,651 (i.e. 2,005,317 gallons per gallon times 1.092) over the same period if his contract with State Oil did not prevent him from earing more than $0.0325 per gallon. Thus, the constraints imposed by State Oil's contract reduced Khan's gross dollar margin on gasoline by $18,478 (i.e. $83,651 less $65,173).

10. I also estimate the gross margin on ancillary sales that Khan would have earned absent the restrictions in the State Oil contract. I performed a series of regression analyses to examine whether there is a relation between ancillary sales and gasoline sales. I found that ancillary sales were statistically significantly related to gasoline sales. I also found that ancillary sales were proportional to gasoline sales. That is, I found that, for example a one percent increase in gallons sold resulted in a one percent increase in ancillary sales. Thus, because I found that Khan's gallon sales would have been about 9.2 percent higher in 1992 absent State Oil's restrictions, ancillary sales also would have been about 9.2 percent higher in 1992 if Khan's pricing policies had not been constrained.

11. Khan's gross margin on ancillary sales in 1992 was $118,448 (i.e. total gross margin of $183,621[2] less gross margin of $65,173 on gasoline sales). Based on the Receiver's experience, Khan could have earned a gross margin on ancillary sales of $129,345 (i.e., $118,448 times 1.092). Thus, the constraints imposed by State Oil's contract reduced Khan's gross dollar margin on ancillary sales by $10,897 and Khan's total gross dollar margin (gasoline and ancillary sales) by $29,375 in 1992.

12. The Receiver's total gross dollar margin for the period May - September 1993 was $89,292. The period May - September 1993 accounted for approximately 42.3 percent of DuPage County's sales of gasoline during 1993. Thus it is mu opinion that Khan's total gross dollar margin in 1993 would have been about $211,092

[2] Based on Khan's U.S. Corporation Income Tax Return for 1992.

(i.e., $89,292 divided by 0.423).[3]

13. I do not have information on the performance of the former Khan location for 1994. Assuming that there were no substantial changes in how the station was operated or in competitive conditions in the immediate vicinity, the stations dollar performance in 1994 likely would have been the same as in 1993, after adjusting for inflation.[4] Inflation during 1994 (as measured by the Consumer Price Index) was about 2.6 percent. Thus, it is my opinion that Khan's gross margin for 1994 would have been $216,580 (i.e. $211,092 times 1.026).

[3] I understand that there were no substantial changes in how the station at the former Khan location was operated or in competitive conditions in the immediate vicinity (e.g., other stations within a few blocks) through November 1993. I assume that there were no substantial changes in conditions during December 1993.

My estimate of gross dollar margin in 1993 is almost the same as in 1992 because the Receiver earned a lower percentage margin on ancillary sales than did Khan (Khan earned about 29 percent margin and the Receiver earned about 24 percent). If the Khan location had earned an average margin on ancillary sales of 29 percent during 1993, my estimate of gross dollar margin for 1993 would be understated by $26,188. Thus the total gross dollar margin for 1993 would be $237,280. Similarly, if the margin on ancillary sales were 29 percent in 1994, the total gross dollar margin would be $243,449.

[4] Total gasoline sales in DuPage county during 1994 were about 4.5 percent higher than sales during 1993. If gallon sales increased by 4.5 percent per gasoline station, on average, my estimate likely understates Khan's total gross dollar margin for 1994 by $9,746; that is, 1994's total gross dollar margin would by $226,326. If the margin on 1994 ancillary sales were 29 percent and gallon sales increased by 4.5 percent per station from 1993 levels, 1994's total gross dollar margin would be $254,404.

Dated May 30, 1995

Gustavo E. Bamberger

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number 94 C 35 Date: September 12, 1995

Name of Assigned Judge: CHARLES R. NORGLE

Case Title: BARKAT U. KHAN and KHAN & ASSOC., INC. v. STATE OIL CO.

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DOCKET ENTRY:

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(10) [Other docket entry]

Court rules in limine that "rule of reason" and not "per se rule" applies in this case.

Regarding final pretrial order, Attachment B, paragraph 3, the court rule in limine that the agreement will be analyzed under a "rule of reason" rather than "per se rule." The U.S. Supreme Court has held that per se rules are appropriate only for conduct that is manifestly anticompetitive, that is, conduct that would always or almost always tend to restrict competition and decrease output. "Per se rules are invoked when surrounding circumstances made the likelihood of anticompetitive conduct so great as to render unjustified further examination of the alleged conduct" *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978) (agreement per se illegal only if their nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish

their illegality). The scope of per se illegality should be narrow in the context of vertical restraints. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). The language in the franchise agreement and the submissions of counsel do not establish manifestly anticompetitive implications or pernicious effect on competition, to justify application if the "per se rule."